BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Closed Captioning and Video Description of Video Programming	)	MM Docket No. 95-176
	)	
Implementation of Section 305 of the Telecommunications Act of 1996	)	
	)	
Video Programming Accessibility	)	

REPLY COMMENTS OF TIME WARNER CABLE

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Time Warner Cable, a division of Time Warner Entertainment Company, L.P. ("Time Warner Cable"), hereby submits its reply comments in the above-captioned proceeding.[1]

I. INTRODUCTION AND SUMMARY.

In its comments in this proceeding, Time Warner Cable urged the Commission to exempt cable local origination programming, start-up cable programming, advertising, and interstitial programming from the closed captioning rules. Time Warner Cable believes that the record of this proceeding supports a conclusion that mandatory captioning of such programming would be

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1 Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility, MM Docket No. 95-176, Notice of Proposed Rulemaking, FCC 97-4 (released January 17, 1997) ("Notice").

"economically burdensome,"[2] and therefore should be exempted under section 713(d)(1) of the Telecommunications Act of 1996.[3]

In these reply comments, Time Warner Cable focuses on two issues. First, Time Warner Cable believes that the Commission should not impose the closed captioning compliance obligation on cable operators for programming which the cable operator is required to carry by law, regulation, franchise agreement or retransmission consent agreement. To hold the cable operator liable for closed captioning compliance in situations where it is powerless to effect the desired public policy result is fundamentally unfair. Second, while some hearing impaired interests urge the Commission not to exempt public, educational and governmental ("PEG") programming, Time Warner Cable respectfully submits that imposing captioning costs on PEG programmers will be "economically burdensome" and will substantially disrupt, if not largely eliminate, the availability of such programming.

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2 See, e.g., ALTS Comments at 10, 15 (advertising, interstitial and promotional programming should be exempted because the marketplace will provide the necessary incentive to caption; locally produced programming should be exempt until captioning can be shown to be cost effective); Joint Parties Comments at 21-24 (locally produced public affairs programming should be exempt because real time captioning is too expensive); C-Span and C-Span 2 Comments at 10 (start-up and limited distribution programming should be exempt for five years because the costs of captioning could prevent the creation or hasten the demise of new programming); American Association of Advertising Agencies at 2-3 (advertising should be exempt because the advertising industry has responded favorably to marketplace incentives to caption; and local advertisers would be economically disadvantaged by captioning requirements).

3 See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act"); see also 47 U.S.C. § 613(d)(1).

II. CABLE OPERATORS SHOULD NOT BE OBLIGATED TO CAPTION PROGRAMMING THEY ARE REQUIRED TO CARRY.

The Commission has proposed that the obligation for complying with the closed captioning rules be placed on video programming providers, which the Commission has defined as all entities providing video programming directly to a customer's home.[4] The National Cable Television Association and several programming networks support the Commission's proposal.[5] However, where cable operators are required to carry programming by statute, regulation, franchise agreement or retransmission consent agreement, the closed captioning compliance obligation should not be placed on cable operators. This is so because the Commission's underlying rationale for placing the closed captioning compliance obligation on cable operators simply is inapplicable in these situations.

The Commission states that "programming providers are in the best position to ensure that the programming they distribute is closed captioned because of their role in the purchasing of programming from producers. For example, a provider can refuse to purchase programming that is not closed captioned."[6] However, where the cable operator is required by statute, regulation, franchise agreement, or retransmission consent agreement to carry the programming, it may not condition carriage on compliance with the closed captioning requirement. Specifically, the

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4 See Notice at ¶ 28.

5 See, e.g. C-Span and C-Span 2 Comments at 6-7; Motion Picture Association of America at 2-4.

6 Notice at ¶ 28.

Communications Act of 1934, as amended (the "Act"), requires that cable operators carry leased access programming[7] and broadcast television stations electing must carry status.[8] Similarly, the Act allows local franchising authorities to require the carriage of PEG programming in the franchise agreement.[9] The Act also requires that cable operators obtain retransmission consent from broadcasters electing retransmission consent status.[10]

Any refusal to carry leased access programming and must carry stations would place the cable operator in violation of the Communications Act; any refusal to carry PEG programming or retransmission consent stations for lack of captioning would place the cable operator in violation of its franchise agreement or retransmission consent agreement, respectively. Moreover, in these situations the cable operator is statutorily barred from adding captions unilaterally, either under the Communications Act[11] or the Copyright Act.[12] In sum, the Commission's proposal

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[7] See 47 U.S.C. § 532.

[8] See 47 U.S.C. §§ 534-35.

[9] See 47 U.S.C. § 531. Local franchising authorities may require that franchise and franchise renewal proposals designate channel capacity for PEG use. See 47 U.S.C. § 531(b). Local franchising authorities are granted statutory authority to enforce a cable operator's PEG obligations. See 47 U.S.C. § 531(c).

[10] See 47 U.S.C. § 325(b).

[11] 47 U.S.C. § 532(c)(2) prohibits cable operators from exercising editorial control over commercial leased access video programming; 47 U.S.C. § 531(e) prohibits cable operators from exercising editorial control over the use of PEG capacity; 47 U.S.C § 325(b)(5) provides that the retransmission consent provision does not alter 17 U.S.C. § 111, the cable compulsory license provision of the Copyright Act.

would create a dilemma under which the cable operator is faced, on one hand, with violating the closed captioning requirement or, on the other hand, the Copyright Act and any applicable PEG, leased access, retransmission consent or must carry carriage requirements. In order to avoid such an untenable result, the Commission should revise its proposal to remove cable operator liability for captioning in situations where the cable operator is required by statute, regulation, franchise agreement or retransmission consent agreement to carry the programming.

III. THE COMMISSION SHOULD EXEMPT PEG PROGRAMMING BECAUSE CAPTIONING WOULD BE ECONOMICALLY BURDENSOME.

While video programming providers generally urge the Commission to exempt PEG access programming,[13] hearing impaired interests generally argue that PEG programming should be captioned.[14] Time Warner Cable is sensitive to the needs of the hearing impaired in this regard; however, the cost of captioning PEG programming would be so economically burdensome that the Commission should exempt it as a class pursuant to section 713(d)(1).

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12 See, generally, Title 17 of the United States Code, and particularly 17 U.S.C. § 111.

13 See, e.g., Ameritech New Media Comments at 15-19; BellSouth Comments at 17; SBC Communications Comments at 5; US West Comments at 3-8.

14 See, e.g., Association of Late-Deafened Adults Comments at 4-6; Captivision Comments at 4-8; Coalition of Protection and Advocacy Systems Comments at 5-8; Consumer Action Network Comments at 6-8.

PEG programming is non-profit and generally is produced by individuals or organizations with limited finances.[15] In fact, PEG programming is often produced on a volunteer basis. PEG access programming is sometimes taped and sometimes live.

The extraordinary cost of closed captioning PEG access programming would overwhelm the vast majority of PEG programmers. Given the nature of PEG access programming, Time Warner Cable believes that a closed captioning requirement could eliminate up to 95 percent of all PEG programming.[16] As a result, any reasonable cost-benefit analysis would support an exemption from closed captioning for PEG access programming. In fact, six of the seven factors Congress instructed the Commission to take into account when considering closed captioning exemptions are directly relevant to PEG access and strongly support an exemption:[17]

- As with most programming, the "cost of providing closed captions" for PEG programming would be significant.

- The "impact on the operation" of PEG programmers would be severe, in many cases resulting in a cessation of such programming.

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15 See, e.g., Community Access Center Comments at 1 (total annual budget of $386,486); Ho'ike: Kauai Community Television, Inc. Comments at 1 (total annual budget of $245,000); City of Lathrup Village, Michigan Comments at 1 (total annual budget of $46,000); Community Access TV of Boulder Comments at 1 ("[i]n almost all cases, local public access organizations operate on modest budgets. . . ").

16 See Alliance for Community Media Comments at 8 ("requiring PEG access centers to shoulder the financial and administrative burden of providing or requiring that every program be closed-captioned would mean the end of PEG access for sighted and non-sighted viewers alike").

17 See Conference Report at 183-84 (discussing and adopting the House Report).

- The "financial resources" of PEG programmers are generally limited and wholly insufficient to undertake captioning.

- The "relative size of the market served" by PEG programming is very small and cannot support the costs of captioning.

- PEG programming is, by its nature, produced "locally" and therefore cannot capture the economies available to national programming services.

- Finally, PEG programming is "non-profit" so imposing captioning costs would be particularly burdensome.

For all these reasons, the Commission should exempt PEG access programming from any closed captioning requirements adopted in this proceeding.

Finally, several commenters argue that if the Commission does not exempt PEG programming, it should provide a source of funding for captioning PEG programming.[18] Some of these commenters also identify the cable operator as a possible source for such funding.[19] The Commission should decline to adopt this suggestion. Imposing on cable operators the cost of captioning PEG programming simply would increase the basic cable rates charged to all subscribers, with a resulting reduction in consumer welfare and conferring a competitive benefit on those MVPDs free of PEG obligations.

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18 See e.g., Alliance for Community Media Comments at 4-7; Southwest Suburban Cable Commission Comments at 3-6.

19 See e.g., Alliance for Community Media Comments at 4-7.

III. CONCLUSION.

For the foregoing reasons, Time Warner Cable requests that the Commission avoid imposing the closed caption compliance obligation on video programming providers where the cable operator is required by statute, regulation, franchise or retransmission consent agreement to carry the programming, and that the Commission exempt PEG programming as a class from the closed captioning requirements of the 1996 Act.

Respectfully submitted,

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